IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 710 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KOLI DILABHAI VALJIBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR HARIN P RAVAL for Appellant(s) : 1,
MR CG MEHTA for Appellant(s) : 1,
MS ML SHAH APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE MD SHAH

Date : 14/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellant-accused being aggrieved and dissatisfied by the judgment and order of conviction dated 23rd July, 1998 passed by the learned Additional Sessions Judge, Surendranagar in Sessions Case No.12 of 1992 whereby the present appellant-accused i.e. original accused no.1 was sentenced to undergo rigorous imprisonment for life and fine of Rs.2000/-, in default, to undergo further 12 months S.I. for the charge under Section 302 of the Indian Penal Code. He was also convicted for 6 months for the charge under Section 135 of the Bombay Police Act.

2. The case of the prosecution in short is that the complainant viz., Pravinsinh Malubha Zala gave complaint on 29.09.1991 alleging inter alia that he is residing in Taramaniya village, Taluka Lakhtar and doing agricultural work. On 29.09.1991, after taking lunch, when he was sitting in the Kodh and smoking at about 11:30 a.m., the accused persons viz., Chika Prabhu and Dila Valji armed with dharia were standing at a distance of 100 feet. At that

time, Bharatsinh Kasubha (the deceased) was coming with a pan of chilly powder from Kumbhar Sheri and when he reached Kolini Kodh, the accused persons gave dharia blow to the deceased on the back side and, hence, the complaint came to rescue and took dharia from the hand of the accused persons. Since the house of the accused – Chika Prabhu was just near the place of offence, he went and took dharia in his hand and gave blow on the head of the deceased, as a result of that, deceased fell down and blood came out from the head of the deceased. Thereafter, both the accused persons ran away from the place of offence. On raising screams, Bhagubha Hamirsinh and surrounding persons gathered there and, thereafter, complainant narrated whole incident to them. Thereafter, the deceased was taken to Lakhtar Hospital in a tractor-tailer, but since the deceased succumbed to the injuries, he was taken to Lakhtar Community Health Centre and, thereafter, complaint came to be given before the Police Station against the accused persons.

3. On the basis of the complaint, the investigation was commenced. During the course of investigation, inquest panchnama was drawn in the presence of panchas, yadi was sent to Medical Officer, Lakhtar for performing postmortem, offence place panchnama

was drawn in the presence of panchas, statements of concerned witnesses were recorded, muddamal weapon i.e. dharia was seized under the panchnama in the presence of panchas and muddamal was sent to F.S.L., Junagadh. After completion of the investigation and, on the basis of the material collected against the appellant-accused, since the Investigating Officer found a primafacie case against the appellant-accused, he submitted chargesheet before the Learned Judicial Magistrate, First Class, Lakhtar. Since the case registered against the appellant-accused was exclusively triable by the Court of Sessions, the Learned Judicial Magistrate, First Class, Lakhtar committed the case to the Court of Sessions under Section 209 of the Criminal Procedure Code vide order dated 18.01.1992. The Court below framed charge against the accused for the offence under Section 302 read with 114 of the I.P.C. and under Section 135 of the Bombay Police Act on 06.03.1998 vide Exh.3 on 06.03.1998, wherein he pleaded not guilty and claimed to be tried.

4. To prove the case against the appellant-accused, the prosecution examined the following witnesses :-

(1) Prosecution Witness No.1 viz., Pravinsinh Malubha, Exh.11.

(2) Prosecution Witness No.2 viz., Kiritsinh Rambha, Exh.13.

(3) Prosecution Witness No.3 viz., Dr.Chandrakant K. Shah, Exh.16.

(4) Prosecution Witness No.4 viz., Mangubha Amarsang, Exh.19.

(5) Prosecution Witness No.5 viz., Pasabhai Kalubhai, Exh.20.

(6) Prosecution Witness No.6 viz., Shankarbhai Mathurbhai, Exh.21.

(7) Prosecution Witness No.7 viz., Ratansinh Chandubha, Exh.22.

(8) Prosecution Witness No.8 viz., Kalubhai Kanjibhai Parmar, Exh.23.

(9) Prosecution Witness No.9 viz., A.S. Mirza, Exh.28.

5. The prosecution has also placed reliance upon the various documentary evidence viz., inquest panchnama at Exh.7, offence place panchnama at Exh.8, panchnama of seizing clothe of the deceased at Exh.9, letter written to F.S.L. at Exh.10, complaint at Exh.12, P.M. Report at Exh.18, arrest panchnama at Exh.29, seizure panchnama of weapon seized from the complainant at Exh.30, FSL report at Exh.31, serological report at Exh.32, map of place of offence at Exh.25 and notification of the

District Magistrate, Surendranagar at Exh.33.

6. The learned Additional Sessions Judge, Surendranagar, after considering and appreciating the evidence on record, was of the view that the prosecution has successfully established the guilt against the appellant-accused for having committed offence punishable under Section 302 read with 114 of the Indian Penal Code and under Section 135 of the Bombay Police Act and, therefore, he accordingly, passed the order of conviction and sentence against the accused persons as stated hereinabove.

7. Being aggrieved by the conviction and sentence awarded by the trial Court, the appellant-accused has preferred this appeal.

8. We have heard learned counsel, Mr.Harin P. Raval for the appellant-accused and learned Additional Public Prosecutor, Ms. M.L. Shah for the State. We have been taken to the record and proceedings by both the sides.

9. Mr.Raval, the learned counsel who appears on behalf of the appellant-accused has contended that the learned trial Judge has committed a grave error in recording the judgment and order of conviction and sentence. Mainly it has been argued by him that the eye witnesses i.e. the complainant and Kiritbhai

both are not witness of incident, but are got up witnesses. It is also contended that the deceased and the complainant are of same community and from same village and, hence, his evidence should not be believed. It is also argued that though the deposition of the witnesses and case of the prosecution is that both the accused persons gave dharia blows to the deceased. However, as per the P.M.Note, there is only one injury and, therefore, the story put forward by the prosecution is not believable. It is argued by the learned counsel for the appellant-accused that in the cross-examination of the complainant, he admitted that first dharia blow was given by the accused – Jika to the deceased on his waist, but inspite of that also, blood did not come out. Not only that, there were no injuries, which could be noticed by the doctor at the time of postmortem. It is also argued that two dharias were seized, of which, blood stain was not found on first one and second was not sent for FSL and, hence, prosecution has even failed to prove the recovery of the muddamal used by the appellant-accused. It is also argued that there are lot of contradictions in the evidence of eye witnesses and other evidence on record and, therefore, according to him, the benefit should go

in favour of the appellant-accused. Learned counsel, Mr.Raval took us through the inquest panchnama at Exh.7, complaint at Exh.12, evidence of P.W.No.1 viz., Pravinsinh at Exh.11 and P.W.No.2 viz., Kiritsinh at Exh.13, P.W.No.9 viz., Mr.Mirza (Investigating Officer) at Exh.28, P.W.No.3 viz., Dr.Chandrakant K. Shah at Exh.16, who was discharging his duty as Medical Officer at Lakhtar Community Health Centre and who performed the postmortem of the deceased and gave P.M.Note, FSL report and also through the reasoned judgment and tried to compare the injuries received by the deceased with the medical evidence and FSL report. It is also argued by him that no motive has been established by the prosecution side. It is a case of only one blow and incident took place in a spur of moment and, therefore, came may be treated under Section 304 Part–II of the Indian Penal Code and convicted under said section.

10. Ms.M.L. Shah, learned Additional Public Prosecutor, who appears on behalf of the respondent-State took us through the reasoning given by the learned Additional Sessions Judge and submitted that no interference is called for in the impugned judgment as the prosecution has established the case against the appellant-accused beyond reasonable doubt. It

is submitted by the learned APP that there are sufficient evidence available on record to connect the appellant-accused with the crime in question. The incident took place in broad day light and in a small village i.e. Taramaniya wherein each and every person of the village is known to each other and, therefore, question of misidentification may not be arisen at all. It is submitted that at the time of incident, the complainant was sitting there and as the quarrel started, he went there and took dharia from the hand of the accused persons and tried to pursue the deceased. The house of the accused – Chika Prabhu was just near to the place of offence and, therefore, he went there and came with dharia and gave blow on the head of the deceased, as a result of that, deceased fell down and blood came out from the head of the deceased. The accused gave dharia blow in such a way that it could not be come out and, hence, the accused persons left it as it is where it is and ran away from the place of offence. After showing evidence, it is submitted that the incident did not take place all of a sudden or by way of certain provocation. After giving first blow, the accused went home and came with deadly weapon and gave blow on the head of the deceased and, hence, it is a

pre-planned murder. After taking us through the evidence of P.W.No.3 viz., Dr.Chandrakant K. Shah, it is submitted that this witness admitted that the injuries received by the deceased could be possible by way of muddamal article nos.8 and 9. Therefore, the case of the appellant-accused cannot be treated under Section 304 Part-II of the Indian Penal Code as argued by the learned counsel for the appellant. Ms.Shah has, therefore, urged that the learned trial Judge was perfectly justified in coming to the conclusion that the appellant-accused was the author of the crime. Raising the abovesaid contentions Mr.Shah has urged that the present appeal deserves to be dismissed.

11. We have dispassionately considered the arguments advanced by the learned Advocate for both the parties. We have throughly examined, scrutinised and re-appreciated the entire evidence led by the prosecution. We have also perused the impugned judgment challenged in this appeal. We have also examined minutely the Record and Proceedings of the case called for from the trial Court.

12. It is required to be noted that the case of the prosecution is based on the evidence of two eye witnesses i.e. P.W.No.1 viz., Pravinsinh at Exh.11 and P.W.No.2 viz., Kiritbhai at Exh.13. As per the

say of the prosecution, they are witnesses of the incident. It is required to be noted that both the witnesses are from the same community and from same village and, hence, their evidence cannot be discarded in toto. What is required to be done is that their evidence is required to be evaluated keeping in mind the above aspect of the matter. We have evaluated the same. As per the evidence of P.W.No.1 viz., Pravinsinh Zala, Exh.11, the incident took place at about 10:30 a.m. to 11:30 a.m. on 29.09.1991. The accused persons gave dharia blows to the deceased and as a result of that, he fell down and, hence, the accused persons ran away from the place of offence. Thereafter, the deceased was taken to Lakhtar Community Health Centre, where doctor on examination declared him dead. Accordingly, this witness gave complaint before the Police Station for the offence under Sections 302 and 114 of the I.P.C. and also under Section 135 of the Bombay Police Act, wherein name and role played by each accused person has been disclosed by this witness. This witness has been thoroughly cross-examined, but nothing contrary came out so as to weaken his evidence and this witness seems to be telling in truth. Therefore, we can say that there is no possibility to connect or falsely involve the

accused with the crime in question. It is also required to be noted that P.W.No.3 viz., Dr.Chandrakant Kasturbhai Shah is also supporting the case of the prosecution. In his examination-in-chief, he deposed that on 29.09.1991, he was discharging his duty as Medical Officer, Community Health Centre, Lakhtar. At that time, at about 2:40 hours, one dead body of Bharatsinh Kashubha was brought before him along with police yadi. He started postmortem at about 3:00 p.m. and completed at about 5:00 p.m. He stated that there was fracture on the skull and as a result of that, the deceased lost his life and the injuries received by the deceased was antimortem, which are sufficient to cause his death in the ordinary course of nature. He opined that death could be possible by way of muddamal article nos.8 and 9. Said fact also got support from the serological report as well as FSL Report. The evidence is required to be evaluated keeping in mind that the complainant is an eyewitness of the incident and at the time of incident, he was present at the scene of offence and his presence is also established by way of evidence on record and hence, his evidence is required to be taken into consideration. It goes without saying that for the purpose of closing shop

by the owner, there will not be any positive documentary evidence, but facts established, which is not denied are that he is also a permanent resident of Taramaniya village residing with his family and he is commuting from Taramaniya to Lakhtar. Not only that, on the day of incident, at the time of preparing panchnama at about 15:45 hours, he has shown scene of offence to the panchas and, therefore also, his presence in Taramaniya at the time of incident or on the day of incident has been established by way of panchnama of scene of offence and, therefore, prosecution was able to prove the case beyond reasonable doubt.

13. As far as the incident is concerned, we have evaluated the evidence on record. We are of the opinion that the incident took place abruptly or by way of certain provocation because evidence on record shows that the accused persons were standing with deadly weapons in their hands and when deceased – Bharatbhai was coming from the other side, the accused – Jika gave one dharia blow to him and, thereafter, the complainant tried to intervene. Meanwhile, the accused went home and came back with dharia and gave another blow to the deceased with full force and, hence, dharia entered into his skull and the accused could not take it

out and, thereafter, they ran away from the place of offence. In these circumstances, even if only one blow was given, then also, it can be said that he had no opportunity to give second blow because it had entered into the skull of the deceased. Over and above, it was a pre-planned murder and after giving blow to the deceased, they ran away from the place of offence and, therefore, we are not able to accept the arguments advanced by the learned counsel for the appellant-accused for treating the case under Section 304 Part-II of the Indian Penal Code. It is required to be noted that while trying to intervene by the complainant, both the accused told him that this is their problem and would solve as per their wish and this also shows the motive behind the offence.

14. In our opinion, therefore, learned Additional Sessions Judge has rightly appreciated the evidence on record by following the established canons of appreciation of evidence. We do not find any merit in this appeal so as to interfere with the findings of the trial Court. We have gone through the judgment of the learned Additional Sessions Judge and find that reasonings adopted and conclusions arrived at by the learned Additional Sessions Judge are just, legal and proper and we are in agreement

with the same.

15. In view of the above, there is no substance in the contention raised by the learned counsel for the appellant-accused. In these circumstances, it is a fit case, wherein appeal is required to be dismissed.

16. The appeal is dismissed.

(R.P.DHOLAKIA, J.) (M.D. SHAH, J.)

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